Pen Apparel Sdn Bhd v Leow Chooi Khon & Ors

HIGH COURT (PENANG) — ORIGINATING SUMMONS NO 24–543–92
VINCENT NG J
19 JUNE 1995

Civil Procedure *— Made of commencement — Non-compliance with procedure — Whether the proceedings should have been begun by writ instead — Whether proceedings should be wholly set aside as irregular proceedings — Whether the court should exercise its discretion to convert or to set aside*

The plaintiffs sold a motor car to the first defendant for a total consideration of RM19,000. Only a sum of RM2,500 was paid. The second defendant granted hire-purchase facilities to the first defendant to enable the first defendant to complete the purchase of the car from the plaintiffs. To facilitate such arrangement, the plaintiffs delivered the registration book of the motor car and a duly executed MV3 form to enable the first defendant to be registered as owner. The second defendant's ownership claim was endorsed on the registration book. The motor car was at all material times in the possession of the plaintiffs pending the full payment of the purchase price. The first and second defendants failed to settle the balance of the purchase price in the sum of RM16,500. The plaintiffs therefore issued the present originating summons claiming a number of declarative and injunctive reliefs, including a declaration that they were the beneficial and registrable owners of the said motor car and an order that the defendants do pay forthwith the said sum of RM16,500, alternatively an order that the defendants do execute all necessary documents and hand over the registration book to restore the legal ownership of the said motor car. The plaintiffs obtained an ex parte injunction against the first and second defendants. The third defendant was subsequently added as a party. The second defendant applied, under summons-in-chambers, to strike out the plaintiffs' originating summons for non-compliance with the RHC, that there were matters which had not been satisfactorily explained in the affidavits and could be resolved only if the proceedings had been begun by writ. The second defendant also claimed that the proceedings should be set aside. It was contended by the plaintiffs that even if the proceedings should have been begun by writ, the court had no power, under O 2 r 1(3), to wholly set aside the proceedings.

Held, setting aside the originating summons:

(1) The test as to the suitability of the mode of commencement of proceedings was laid down in *Ting Ling Kiew v Tang Eng Iron Works Co Ltd* [1992] 2 MLJ 217.

(2) In the light of this test, the mode of institution of the current action adopted by the plaintiffs was clearly inappropriate and

not in accordance with the RHC, which made the proceedings irregular.

(3) Whereas O 2 r 1(2) and O 28 r 8(1) clearly gave a discretion to the judge on whether to convert an originating summons into writ action, a strict interpretation of O 2 r 1(3) would have the effect of negating or making nugatory, the court's discretion to convert as embodied in O 28 r 8(1), in which event this rule would have been worded as 'the court shall order the proceedings to continue as if ...'.

(4) The correct approach would be for the court to take the view that since O 2 r 1(2) read in conjunction with O 28 r 8(1) allowed the court the discretion on whether to convert the proceedings into writ action, O 2 r 1(3) ought not to be read to mean that the court was precluded from striking out or wholly set aside proceedings treated under O 2 r 1(1) as an irregularity, a fortiori as it was expressly provided under O 2 r 2(1) for proceedings to be set aside due to an irregularity.

(5) This was precisely the interpretation ascribed to O 2 r 2 of the English Rules of the Supreme Court, which was in pari materia with O 2 r 2 of the RHC.

(6) Thus, not only did the court have a clear and unencumbered discretion on the question of whether to convert the originating summons into writ action, but if the court declined to exercise its discretion, it was vested with ample powers to strike out an irregular proceedings, upon an application made.

(7) The guidelines to be followed in deciding whether to exercise the court's discretion to convert or to set aside were: (i) the conduct of the plaintiffs on the mode employed in instituting their action; (ii) whether any embarrassment or prejudice had been caused to the defendant thereby; and (iii) the intention of the legislature in increasing the jurisdiction of the lower courts.

(8) It was obvious that the main thrust of the plaintiffs' claim was for the balance purchase price of the car, it was thus unnecessary to file the action in the High Court; proceedings could very well have been instituted or reinstituted in the magistrate's court.

(9) The clear intention and motivation of the legislature in increasing the jurisdiction of the lower courts was to alleviate the back-log of cases in the High Court by requiring litigants to file proceedings in the lower courts if the ambit of their claims was within the jurisdiction of the lower courts. By filing their claim in the High Court, bereft of any plausible reason to do so, the plaintiffs had starkly and blatantly gone against the spirit and intention of the legislature.

(10) The mode employed by the plaintiffs showed a deliberate attempt to avoid compliance with the Rules. The contents of the originating summons disclosed a contumelious and

outrageous abuse of the High Court's jurisdiction on declarative and injunctive reliefs. By so doing they had also caused some prejudice to the defendants as they had obtained an ex parte injunction from the High Court without any undertaking as to damages when the essential nature of the claim was for the balance of the purchase price on the motor car. In such circumstances the court might order the costs be paid and borne by counsel personally.

(11) Despite the monetary value of the suit being only RM165,000 and as such eminently within the purview of the lower courts, the plaintiffs had also applied for an injunction which impinged on innocent parties who had committed no fraud. Although the alleged real culprit of the whole episode, namely the third defendant was added as a party, there appeared to be no claims in the originating summons against him. The defendants were therefore seriously embarrassed and prejudiced by the plaintiffs' acts.

(12) The plaintiffs' originating summons should therefore be wholly set aside with costs to the first and second defendants.

[Bahasa Malaysia summary

Plaintif menjual sebuah kereta kepada defendan pertama untuk jumlah balasan sebanyak RM190,000. Hanya sebanyak RM2,500 dibayar. Defendan kedua memberikan kemudahan sewa beli kepada defendan pertama untuk membolehkan defendan pertama menyempurnakan pembelian kereta itu daripada plaintif. Untuk memudahkan rancangan itu, plaintif menyerahkan buku pendaftaran kereta itu dan borang MV3 yang telah disempurnakan untuk membolehkan defendan pertama didaftarkan sebagai pemunya. Tuntutan hakmilik defendan kedua diendors di atas buku pendaftaran itu. Kereta itu pada semua masa penting berada dalam milikan plaintif sementara menunggu bayaran penuh harga belian. Defendan pertama dan kedua gagal untuk menyelesaikan baki harga belian sebanyak RM16,500. Oleh itu plaintif mengeluarkan saman pemula menuntut beberapa relief deklarasi dan injunksi, termasuk satu deklarasi bahawa mereka adalah pemunya benefisial dan boleh didaftar kepada kereta tersebut dan satu perintah bahawa defendan-defendan membayar jumlah sebanyak RM16,500, atau secara alternatif satu perintah bahawa defendan-defendan menyempurnakan semua dokumen-dokumen yang perlu dan menyerahkan buku pendaftaran untuk mengembalikan hakmilik yang sah kepada kereta tersebut. Plaintif mendapat injunksi ex parte terhadap defendan pertama dan kedua. Defendan ketiga kemudiannya ditambah sebagai suatu pihak. Defendan kedua memohon, di bawah saman dalam kamar, untuk membatalkan saman pemula plaintif kerana tidak mematuhi Kaedah-Kaedah Mahkamah Tinggi 1980, bahawa terdapat perkara yang tidak diterangkan dengan memuaskan dalam afidavit-afidavit

dan hanya boleh diselesaikan jika prosiding itu dimulakan dengan writ. Defendan kedua juga mendakwa bahawa prosiding itu patut diketepikan. Adalah ditegaskan oleh plaintif bahawa jika pun prosiding itu sepatutnya telah dimulakan dengan writ, mahkamah tidak mempunyai kuasa, di bawah A 2 k 1(3), untuk mengetepikan prosiding itu keseluruhannya.

Diputuskan, mengetepikan saman pemula itu:

(1) Ujian untuk kesesuaian cara pemulaan prosiding telah dinyatakan dalam *Ting Ling Kiew v Tang Eng Iron Works Co Ltd* [1992] 2 MLJ 217.

(2) Memandangkan kepada ujian ini, cara memulakan tindakan sekarang yang diambil oleh plaintif adalah jelas tidak sesuai dan tidak mengikut Kaedah-Kaedah Mahkamah Tinggi 1980, yang menjadikan prosiding itu di luar aturan.

(3) Manakala A 2 k 1(2) dan A 28 k 8(1) dengan jelasnya memberi budi bicara kepada hakim sama ada untuk menukarkan saman pemula kepada tindakan writ, tafsiran yang ketat bagi A 2 k 1(3) akan mempunyai kesan menafikan budi bicara mahkamah untuk menukar seperti yang terkandung dalam A 28 k 8(1), yang mana dalam keadaan ini kaedah ini sepatutnya disebut sebagai 'mahkamah boleh memerintahkan prosiding itu untuk diteruskan seolah-olah ...'.

(4) Pendekatan yang betul adalah untuk mahkamah mengambil pandangan bahawa oleh kerana A 2 k 1(2) dibaca bersama dengan A 28 k 8(1) membenarkan mahkamah menggunakan budi bicara sama ada untuk menukar prosiding itu kepada tindakan writ, A 2 k 1(3) sepatutnya tidak boleh dibaca sebagai bermakna bahawa mahkamah dihalang daripada membatalkan atau mengetepikan keseluruhan prosiding yang dianggap sebagai luar aturan di bawah A 2 k 1(1), a fortiori kerana ia diperuntukkan dengan nyatanya di bawah A 2 k 2(1) bagi prosiding diketepikan oleh kerana luar aturan.

(5) Ini adalah secara tepatnya tafsiran yang diberikan kepada A 2 k 2 Kaedah-Kaedah Mahkamah Agung Inggeris, yang sama dengan A 2 k 2 KMT.

(6) Oleh itu, bukan sahaja mahkamah mempunyai budi bicara yang jelas dan tanpa halangan atas persoalan sama ada untuk menukar saman pemula kepada tindakan writ, tetapi jika mahkamah menolak untuk melaksanakan budi bicaranya, ia diletakhak dengan kuasa yang cukup untuk membatalkan prosiding yang di luar aturan, atas permohonan yang dibuat.

(7) Garis panduan untuk diikuti dalam memutuskan sama ada untuk melaksanakan budi bicara mahkamah untuk menukarkan atau untuk membatalkan adalah: (i) kelakuan plaintif atas cara yang digunakan dalam memulakan tindakan mereka; (ii) sama ada apa-apa kemudaratan telah disebabkan kepada

defendan; dan (iii) tujuan badan perundangan dalam menambahkan kuasa mahkamah rendah. A

(8) Adalah jelas bahawa teras utama tuntutan plaintif adalah untuk baki harga belian kereta itu; oleh itu adalah tidak perlu untuk memfailkan tindakan itu di Mahkamah Tinggi; prosiding boleh dimulakan atau dimulakan semula di mahkamah majistret. B

(9) Adalah jelas tujuan dan dorongan badan perundangan dalam menambah bidang kuasa mahkamah rendah adalah untuk mengurangkan kes-kes tertangguh di Mahkamah Tinggi dengan menghendaki litigan untuk memfailkan prosiding di mahkamah rendah jika tuntutan mereka adalah dalam bidang kuasa mahkamah rendah. Dengan memfailkan tuntutan mereka di Mahkamah Tinggi tanpa alasan yang munasabah, plaintif jelas kelihatan dan secara terang-terangan telah membelakangi maksud yang tersirat dan tujuan badan perundangan. C

(10) Cara yang digunakan oleh plaintif menunjukkan cubaan yang sengaja untuk mengelakkan kepatuhan kepada Kaedah-Kaedah. D Isi kandungan saman pemula mendedahkan penyalahgunaan bidang kuasa Mahkamah Tinggi di atas relief-relief deklarasi dan injunksi yang bersifat menghina dan melampau. Dengan melakukan demikian mereka juga telah menyebabkan beberapa kemudaratan kepada defendan kerana mereka telah mendapat E injunksi ex parte daripada Mahkamah Tinggi tanpa apa-apa akujanji berkenaan dengan ganti rugi apabila apa yang penting bagi tuntutan itu adalah baki harga belian kereta itu. Dalam keadaan-keadaan seperti ini mahkamah boleh memerintahkan kos dibayar dan ditanggung oleh peguam secara persendirian.

(11) Walaupun nilai kewangan guaman itu hanya RM165,000 dan F oleh itu dengan jelas dalam skop mahkamah rendah, plaintif juga telah memohon injunksi yang meninggalkan kesan pada pihak yang tidak bersalah yang tidak melakukan apa-apa fraud. Walaupun pihak yang bersalah yang dikatakan dalam keseluruhan episod, iaitu defendan ketiga ditambah sebagai G pihak, nampaknya tidak ada tuntutan dalam saman pemula terhadapnya. Defendan-defendan oleh itu telah dimudaratkan dengan serius oleh tindakan-tindakan plaintif.

(12) Saman pemula plaintif oleh itu sepatutnya diketepikan keseluruhannya dengan kos kepada defendan pertama dan kedua.] H

Notes

For cases on mode of commencement and non-compliance of procedure, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2292–2317; [1994] *Mallal's Digest* 396. I

Cases referred to

Abdul Majid v Haji Abdul Razak [1971] 2 MLJ 228 (refd)
Ashmore v Corp of Lloyd's [1992] 2 All ER 486 (refd)

A *Mohammed bin Ismail v Tan Sri Haji Osman Saat & Ors* [1982] 2 MLJ 133 (refd)
Ting Ling Kiew v Tang Eng Iron Works Co Ltd [1992] 2 MLJ 217 (folld)
Soo Shiok Liong v Pendakwa Raya [1993] 2 MLJ 381 (refd)

B *Hira Singh* (*Asbir, Hira Singh & Co*) for the plaintiffs.
Habib Rahman Seeni Mohideen (*Mohideen & Partners*) for the first defendant.
Arivanandhan s/o Venugopal (*Cheong Wai Meng & Van Buerle*) for the second defendant.
C *Goh Siew Kin* (*BC Teh & Yeoh*) for the third defendant.

Cur Adv Vult

Vincent Ng J: On 30 June 1992, the plaintiff company ('the plaintiffs') filed an originating summons (encl 3) seeking:
D
(1) A declaration that the plaintiffs are the beneficial and registrable owners of the motor car No PBJ 7531 ('the said car').

(2) An order that the first defendant and second defendant company (second defendants) do forthwith pay the balance of the purchase price of RM16,500 for the sale of motor car
E bearing registration No 7531 to the plaintiffs.

(3) Alternatively, an order that the first and second defendants do execute all necessary documents and hand over the registration book to restore the legal ownership of the motor car bearing registration No PBJ 7531 to the plaintiffs within seven (7)
F days from the date of the order sought.

(4) In the event the first and second defendants fail to comply with the order sought under para 3 above herein, that the Ketua Pendaftar, Jabatan Pengangkutan Jalan, Pulau Pinang, as the appropriate registering authority be ordered to rectify
G the registration book with the plaintiff restored as the true registered owner of the said motor car.

(5) That pending the determination of this summons, the plaintiffs be entitled to renew the road tax and other relevant documents for the use of the said motor car in their business.

H (6) The first and second defendants by themselves, their servants or agents or otherwise howsoever be restrained from interfering in the plaintiffs' use and possession of the said motor car.

(7) Such further or other relief as this Honourable court may deem fit.

I In order to indicate the true nature of the plaintiffs' claim it is perhaps pertinent to set out the following material averments in the supporting affidavit of one Keith Chong Yong Woo, the Assistant Managing Director of the plaintiff company affirmed on 30 June 1992 (encl 2):

(a) On the 7th day of December, 1991, there was a sale of the said motor car from the plaintiffs to the first defendant for a total consideration of the sum of RM19,000 of which sum only a sum of RM2,500 has to-date been paid to the plaintiffs.

(b) The second defendant granted hire purchase facilities to the first defendant to enable the first defendant to complete the purchase of the said motor car from the plaintiffs.

(c) To enable the first defendant to arrange for hire purchase facilities to purchase the said motor car the plaintiffs delivered the registration Book of the said motor car and a duly executed MV3 Form for the former to be registered as owner of the said motor car.

(d) The first defendant has caused himself to become the registered owner of the said motor car wef 7 December 1991 with the second defendant's ownership claim endorsed on the Registration Book.

(e) At all material times, during the above transactions, and until now the said motor car is in the possession of the plaintiffs pending the full payment of the purchase price.

(f) Despite repeated demands having been made by the plaintiffs and the last of which was made by their solicitors, Messrs. Asbir, Hira Singh & Co, first and second defendants have refused and continue to refuse to pay the balance of the purchase price of RM16,500 or any part thereof to the plaintiffs

Soon thereafter, on 1 July 92 the plaintiffs obtained, ex-parte, an order allowing the plaintiffs to renew the road tax and other relevant documents for the use of the said car in its business. It was also further ordered that the defendants by themselves, their servants or agents be restrained from interfering in the plaintiffs' use and possession of the said car. This then resulted in the second defendants applying to set aside the said orders made on 1 July 92.

Currently, before me, is the second defendants' application under summons-in-chambers dated 15 June 1993 (encl 26) to strike out the above originating summons, for non-compliance with the Rules of the High Court 1980. In their supporting affidavit affirmed on 14 June 1993 (encl 25) the second defendant averred that there are matters which had not been satisfactorily explained in the affidavits and could be resolved only if the proceedings had been begun by writ. It is inappropriate to decide disputed facts summarily by relying simply on affidavit evidence.

Paragraphs 7 and 8 of encl 25 were expressed thus:

7 ... Furthermore on 1 July 1992, the plaintiffs, through their solicitors, obtained before the Judge in Chambers an ex-parte order-in-terms of prayers 5 and 6 of their originating summons. The matter was dealt with in a very hurried and summary manner without notice to the other parties in this suit thereby potentially causing grave injustice to the second defendant.

8 I am advised by my solicitors and verily believe that in the light of the uncertainties of the various facts and the law with respect thereto, it is inappropriate on the part of the plaintiffs to commence this suit

A by originating summons. I with humble respect urge upon this Honourable court for an order that the plaintiffs' originating summons dated 30 June 1992 and filed herein on even date be dismissed with costs for failure to comply with the requirements of the Rules of High Court 1980 in respect of manner and form.

B In their affidavit in reply affirmed by the said Keith Chong Yong Woo on 16 April 1994 (encl 32), the plaintiffs contended (in para 6) that they believed that this originating summons was the more appropriate mode of commencement of the action, as the issue of who had the better title to the said car was primarily a question of law and there was unlikely to be any substantial dispute of fact. However, in para 7 of the C same affidavit the plaintiffs had also stated that they had no knowledge of the purchase price paid on the said car by the second or the first defendant to the third defendant and further disputed the nature and capacity of the involvement of the third defendant. Thus, clearly the various affidavits disclose serious disputes of fact and law to be tried.

D Be that as it may, at the hearing of encl 26, counsel for the plaintiffs, Mr Hira Singh applied to the court to convert this Originating summons to a writ action under O 28 r 8(1) of the Rules of the High Court 1980 ('RHC'), as, to quote him in his submission: '... both the plaintiffs' and the second defendant's affidavits disclose disputes of fact,' and 'It is not disputed here by the parties that the action ought to E have been commenced by writ'. To that end, he further submitted that O 2 r 1(3) debars the court from setting aside the whole of the proceeding but to convert the originating summons into a writ action.

Encik Ari, counsel for the second defendant countered that the court has a discretion whether or not to convert, which it should not F exercise if the plaintiffs were aware at the outset that this matter involved triable issues and serious conflict of fact; and it follows that if the court does not exercise its discretion, an irregular proceeding ought to be wholly set aside. He further submitted that grave injustice would be caused to all the defendants, especially the second defendant if the originating summons were just allowed to be converted to a writ action. G And, the parties and also the court will be embarrassed by the turn of events. It would be better for all the parties concerned if this originating summons was struck off with liberty to the plaintiffs to file afresh.

Cik Goh, counsel for the third defendant added that the originating summons in substance talks about the unpaid balance purchase price H and as such it was an enforcement of a contractual remedy to the extent of RM16,500, which is within the jurisdiction of the lower court. Cik Goh urged the court not to exercise its discretion under O 28 r 8(1) but to set aside the originating summons with liberty to the plaintiffs to file afresh in the lower court.

I In reply, Encik Hira Singh said that the reliefs sought are clearly declaratory as regards title of the car and rectification of the register. He did not dispute the fact that the action sought should have been commenced by writ but this only became apparent later on in the proceedings.

The application before me calls for determination of only three basic issues, namely: A

(1) whether the mode adopted by the plaintiffs to institute their action was appropriate;

(2) if the mode of commencement is inappropriate and hence, irregular, whether the court has a discretion to convert or set aside; and B

(3) if the court has such discretion, then the guidelines to follow in deciding whether to convert or to set aside.

On the first issue

As the first issue became a non-issue, suffice it only for me to restate C the dicta of the Supreme Court in *Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd* [1992] 2 MLJ 217 on the test to apply to determine the suitability of the mode of commencement of the proceedings. Therein, it was held that:

(1) Apart from the various inconsistencies in the affidavits of the D appellants and respondents in the court below, there were other matters which had not been satisfactorily explained in the affidavits and could be resolved if the proceedings had been begun by writ.

(2) The conflicts in the evidence could only be properly and satisfactorily resolved if oral evidence was adduced and witnesses cross-examined on their evidence which, however, was not possible in proceedings E begun by originating summons. In any case it was most inappropriate and iniquitous to decide disputed facts summarily by relying simply on affidavit evidence.

Thus, the mode of institution of the current action adopted by the plaintiffs was clearly inappropriate and not in accordance with the F Rules of the High Court 1980, which makes the proceeding irregular.

On the second issue

The principal and indeed the sole thrust of the plaintiffs' argument is that under O 2 r 1(3) the court is not clothed with any powers to wholly G set aside a proceeding begun by an originating summons, even upon the application of the defendants on the grounds of failure of the plaintiffs to comply with the requirements of the Rules in the commencement of proceeding. The case of *Ting Ling Kiew & Anor* (supra) was cited by the plaintiffs' counsel to support his contention.

In the case of *Ting Ling Kiew v Tang Eng Iron Works Co Ltd* (supra), H Jemuri Serjan CJ (Borneo) who delivered the judgment of the Supreme Court held that the procedure under O 28 r 8(1) is the appropriate procedure to adopt. Therein, the learned Chief Justice referred to the case of *Re Deadman (deceased)* [1971] 1 WLR 426 where Stamp J expressed his view on point in the following words (see p 429): I

> The existence of this sub-rule (O 2 r 1(3)) does, I think assist me to come to the conclusion that the inclusion now of a claim which would have required the action to have been brought by writ is not fatal to the continuance of the action.

It was also held in the case of *Mohamed bin Ismail v Tan Sri Haji Osman Saat & Ors* [1982] 2 MLJ 133 that although the procedure adopted by the applicant by motion instead of by writ was wrong it merely rendered the proceedings irregular but by no means void. And, the court *may* (emphasis is mine) if it is satisfied that the parties, their counsel and the court will not be seriously embarrassed by the irregularity and that such irregularity will not lead to injustice in any party, proceed to hear and determine the case as a motion.

Counsel for the plaintiffs would appear to have misread and misapplied the ratio in *Ting Ling Kiew & Anor* (supra), for, unlike the facts therein, in the present case the second defendant had specifically and expressly applied in encl 26 for an order that:

> ... the plaintiffs OS No 24–543–92 (encl 3) dated 30 June 1993 and filed herein be dismissed with costs for non-compliance with the Rules of the High Court 1980.

It is important to bear in mind that there was no application to strike out and the only dominant and crucial issue that fell for determination by the Supreme Court in *Ting Ling Kiew* (supra) was whether the learned trial judge had erred in law in not having exercised his discretion under O 28 r 8(1) of the Rules. The kernel or gist of the decision therein was as follows:

> The learned trial judge erred in law in dealing with the application summarily by an originating summons under O 88 r 2(1) when he should have resorted to O 28 r (8) of the RHC, especially in the light of the plea of fraud and the conflicting affidavit evidence.

Indeed, at the hearing of the appeal in *Ting Ling Kiew* it was strenuously canvassed that the learned trial judge had, after considering O 28 r 8 (1), decided not to convert, but to continue the proceeding in its original form in the teeth of the plea of fraud and conflicting affidavit evidence. Hence, the Supreme Court was eminently correct in holding that the learned judge should have exercised his discretion to order the proceedings to continue as a writ action pursuant to O 28 r 8(1).

Also to be noted is that in that judgment Jemuri Serjan CJ (Borneo) went on further to say, at p 229:

> ... But in our view, he (the learned judge) is not precluded in the exercise of his discretion from making an order that the proceedings should be continued as if begun by writ pursuant to O 28 r 8(1) bearing in mind also O 5 r 2(b). Indeed, it is within his absolute discretion and he is justified to in the circumstances of this case in order to resolve the conflicts of affidavit evidence and reach a well-balanced decision.

For a proper determination of this point it is essential to examine O 2 with a fine tooth comb to give it its true construction. O 2 r 1(3) states as follows:

> The court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these Rules to be begun by an originating process other than the one employed.

Order 2 r 1 (1) provides that if: A

> ... there has ... been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content ... the failure shall be treated as an irregularity and shall not nullify the proceedings...

It is, however, equally clear from O 2 r 1(2) that: B

> Subject to para (3), the court may, on the ground that there has been such a failure as is mentioned in para (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its C powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

Consequently, O 2 r 1(2) despite the words 'subject to para (3)', seems, to whittle down the import of the phrase 'the court shall not wholly set D aside' occurring in r 1(3) and thus allowing the court to set aside proceedings which, under r 1(1), is 'treated as an irregularity'. For guidance in construing O 2 r 1(3) the court could also take a look at the other provisions of the rules of the RHC.

In this regard, O 28 r 8 would be of some assistance. Rule 8(1) of O 28 reads: E

> Where, in the case of a cause or matter begun by originating summons, it appears to the court ... the proceedings should ... be continued as if the cause or matter had been begun by writ, it may order (and not it shall) the proceedings to continue as if the cause or matter had been so begun ...

Whereas, O 2 r 1(2) and O 28 r 8(1) clearly give a discretion to the F judge on whether to convert an originating summons into writ action, a strict interpretation of O 2 r 1(3) would have the effect of negating or making nugatory, the court's discretion to convert as embodied in O 28 r 8(1); in which event this rule would have been worded as 'the court shall order the proceedings to continue as if ...'. G

Thus, the correct approach would be for the court to take the view that since O 2 r 1(2) read in conjunction with O 28 r 8(1) and indeed the decided cases unequivocally allow the court the discretion on whether to convert the proceedings into writ action, O 2 r 1(3) ought not to be read to mean that the court is precluded from striking out or wholly setting aside proceedings treated under O 2 r 1(1) as an H irregularity; a fortiori as it is expressly provided under O 2 r 2(1) for proceedings to be set aside due to an irregularity. As, O 2 r 1 of the Rules merely provides that failure to comply with the Rules of the High court does not nullify the proceeding but such proceeding is to be treated as an irregularity , it is important to have in the forefront of I one's mind, the trite law that (besides O 2 r 2(1)) irregular proceedings may by order be set aside. Thus, O 2 r 1(3) should be read under the dazzling light of the potent combined illumination provided by O 2 r 1(1), r 1(2), O 28 r 8(1) and O 2 r 2(1).

Order 2 r 2(1) states as follows:

> An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time, and before the party applying has taken any fresh step after becoming aware of the irregularity.

As such, the contention of counsel for the plaintiffs that the court is not clothed with any power to strike out, save to order that the originating summons filed by his client to be continued as if begun by writ, is untenable and without any logical foundation.

My above construction of O 2 of our RHC is precisely the interpretation ascribed to O 2 r 2 of the English Rules of the Supreme Court (which is pari materia with our O 2 r 2 RHC) by FA Bennion in his work *Statutory Interpretation – A Code* (2nd Edn) where, at p 31, he wrote:

> Failure to comply with the Rules of the Supreme Court does not nullify the proceedings, but is to be treated as an irregularity. Irregular proceedings may by order be set aside.

Similar opinion is also expressed in *Mallal's Supreme Court Practice* Vol 1, 2nd Ed p 9, under the caption Failure to Comply:

> A failure to comply shall be treated as an irregularity and not a nullity. It is curable on terms. Nevertheless, the court retains the discretion to set aside either wholly or in part the proceedings.

Thus, upon proper interpretation of O 2 and the authoritative views expressed by the aforesaid authors, I hold that, not only does the court have a clear and unencumbered discretion on the question of whether to convert the originating summons into writ action, but if the court declines to exercise its discretion, it is vested with ample powers to strike out an irregular proceeding, upon an application made. The decision of Chang Min Tat J (as he then was) in *Abdul Majid v Haji Abdul Razak* [1971] 2 MLJ 228 lends further support to my above view, as therein it was held that 'the originating summons is not a suitable medium or process for the determination of the issues raised' and the originating summons therein was dismissed in limine.

This second issue brings to mind the observations of Lord Roskill in the House of Lords decision of *Ashmore v Corp of Lloyd's* [1992] 2 All ER 486, concerning the court's prerogative to preclude parties from dictating to the court in what manner a case should be tried. He had this to say:

> The Court of Appeal appear to have taken the view that the plaintiffs were entitled as of right to have their case tried to conclusion in such manner as they thought fit and if necessary after all the evidence on both sides had been adduced. With great respect, like my noble and learned friend, I emphatically disagree. In the commercial court and indeed in any trial court it is the trial judge who has control of the proceedings. It is part of his duty to identify the crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in

> carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judge's time as is necessary for the proper determination of the relevant issues.

Lord Templeman who concurred with Lord Roskill in that decision, went further to elaborate this:

> In my opinion, when a judge alive to possible consequences decides that a particular course should be followed in the conduct of the trial in the interests of justice, his decision should be respected by the parties and upheld by an appellate court unless there are very good grounds for thinking that the judge was plainly wrong.

On the third and last issue

Since the court has a discretion on whether or not to convert the orignating summons, certain guidelines are to be followed in deciding whether to exercise its discretion to convert or to set side. They are:

(a) the conduct of the plaintiffs on the mode employed in instituting their action;

(b) whether any embarrassment or prejudice has been caused to the defendant thereby;

(c) the intention of the legislature in increasing the jurisdiction of the lower courts.

It is obvious that the main thrust of the plaintiffs' claim is for the balance purchase price of the car amounting to RM16,500 (vide prayer 2 above). It is thus unnecessary to file the action in the High court, though the plaintiffs had also claimed for possession of the log-book of the car. They had not denied that they had sold the car, for which the Third defendant had apparently failed to account to them on the balance of the purchase price of RM16,500. The clear intention and motivation of the legislature — by recent amendment in the Subordinate Courts Act 1948 — in increasing the jurisdiction of the lower court, is to alleviate the back-log of cases in the High courts by requiring litigants to file proceedings in the lower court if the ambit of their claim is within the jurisdiction of the lower courts. The imperatives of the situation on back-log of cases in our High Courts do not permit a liberal approach in this respect. Thus, by filing their claim in the High Court bereft of any plausible reason to do so, the plaintiffs had starkly and blatantly gone against the spirit and intention of the legislature. And, the mode employed in instituting the proceeding shows a deliberate attempt to avoid compliance with the Rules. The contents of the originating summons discloses a contumelious and outrageous abuse of the High Court's jurisdiction on declarative and injunctive reliefs. By so doing they had also caused some prejudice to the defendants as they had obtained an exparte injunction on 1 July 1992 from the High Court, indeed without any undertaking as to damages, when, at the risk of reiterating, the essential nature of the claim is for the balance of the purchase price on the said car. Where the facts and circumstances

A disclose such contumelious and blatantly unwarranted conduct in the manner an action is instituted, the court may order that costs be paid and borne by counsel personally.

It is hoped that this is not a typical case of a plaintiff's fixation on the prospect of the higher costs to be secured in a High Court action. B Surely, the rosy prospect of securing substantially higher costs in a suit — of course couched in prayers, for eg declarations and injunctions — filed in the High Court, should never even remotely form any part of the basis of a litigant's consideration when he decides upon the venue in which to institute his claim. In any event, such party and party costs would normally belong to the lawyer under the usual retainer terms.

C In the case at hand, it is also pertinent though of somewhat lesser importance vis-a-vis guidelines (a) and (c) above, to consider — as enjoined by Wan Yahaya J in *Mohd bin Ismail* (supra) — whether the second defendant was seriously embarrassed or in any way prejudiced by the plaintiff's acts. Though, we have to be mindful that in *Mohd bin* D *Ismail* (supra) the decision was on the question of whether to convert and not whether to wholly set aside proceeding if not converted. Here, despite the monetary value of the suit being only RM16,500, and as such, eminently within the purview of the lower court, the plaintiff had also applied for an injunction which impinges, on innocent parties who had committed no fraud. And, although the alleged real culprit of the E whole episode, namely the third defendant was added as a party, there appear to be no claims in the originating summons against him. On this score the contents in paras 11 to 14, 17 and 18 of the second defendants affidavit affirmed on 6 August 1992 (encl 8) in support of their application to set aside the injunctive order dated 1 July 1992, would be F pertinent, and this court accepts. Therein, the following are deposed to and not seriously challenged by the plaintiffs' affidavit in reply:

> 11 In the premises, I am advised by my solicitors and verily believe that the injunctive relief made pursuant to the said order ought not to have been granted as the plaintiffs' claim is for damages which is G purely a monetary claim being the balance purchase price of RM16,500.
>
> 12 I am advised by my solicitors that the first and the second defendants should not be made to suffer as neither was privy to the sale and purchase agreement or arrangement made between the plaintiff and James Loh Auto.
>
> H 13 In respect of the order made pursuant to prayer 5 of the originating summons filed herein, I am advised by my solicitors that there has been material non-disclosure of material facts pertaining to the matter which was not brought to the learned judge's attention in the ex-parte hearing on 1 July 1992.
>
> 14 As stated earlier, the second defendant is contractually bound with the I first defendant under the said Hire-Purchase and not privy to the sale and purchase agreement between the plaintiff and James Loh Auto.
>
> 17 Further, I am advised by my solicitors and verily believe that as the said order is by its nature an interlocutory injunction and undertaking as to damages ought to be given by the plaintiff and/or its solicitors.

18 I am advised by my solicitors that as the required undertaking is not given, the interlocutory injunction is irregular. A

In conclusion, as:

(i) it was agreed by the parties before me that the originating summons is not a proper mode of commencing the proceedings due to material dispute of facts; B

(ii) I have found the conduct of the plaintiff in filing this action in the High Court to be contumelious and unwarranted; and

(iii) the filing of the claim for declarative and injunctive reliefs in the High Court with injunctive reliefs obtained, has seriously prejudiced and embarrassed the defendants, as deposed to in paras 11 to 14 and 17 and 18 of encl 8; C

I decided not to exercise my discretion under O 2 r 8(1) and consequently, ordered that the plaintiffs' originating summons be wholly set aside with costs to the first and second defendants.

Following closely thereafter, in para 4 of their affidavit (encl 45) supporting their application for stay of execution — which was turned down by this court — the plaintiffs had affirmed as follows: D

4. The plaintiff has after careful consideration both of questions of facts and law, decided to appeal to the Court of Appeal against the whole of the said decision. The plaintiff strongly feels that great injustice has been done to it for it has lost the remaining sum payable by the first and the second defendant and also lost the registration book for motor-car no PBJ 7531. E

The plaintiffs seemed to allege that my decision here in striking out their originating summons had done 'great injustice' to them. In this regard it must be noted that the cause of this 'great injustice', if any, stems from their own folly of instituting his claim in the High Court and in the manner they did. Concerning the remarkable affirmance in para 4 of their affidavit, it may perhaps be appropriate here to reiterate the following which I expressed per curiam in *Soo Shiok Liong v Pendakwa Raya* [1993] 2 MLJ 381 at p 386: F G

> This court is of the view that while there is no obligation placed on counsel, when preparing affidavits, to verify the truth of statements affirmed by their clients in their affidavits, it is nevertheless the duty of counsel, as officers of the court, to desist from being a party to the inclusion in such affidavits, statements that they ought to, or are in the position to know to be untrue. Such conduct by counsel would be dishonest and unbefitting within the meaning of the strictures contained in s 93(2)(b) of the Legal Profession Act 1976. H

The court ought such a view, as empirical evidence shows that it is rarely that a client would refuse to affirm an affidavit on the ground of impropriety or scandalous nature of the contents of an affidavit dished out to him by his own lawyer. I

Finally, also in *Ashmore*'s case (supra), another perceptive observation of Lord Templeman on the point of demands on the judge's time, is quotable. This is what his Lordship had to say (at p 493):

> The parties and particularly their legal advisers in any litigation are under a duty to co-operate with the court by chronological, brief and consistent pleadings which define the issues and leave the judge to draw his own conclusions about the merits when he hears the case. It is the duty of counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner. In nearly all cases the correct procedure works perfectly well. But there has been a tendency in some cases for legal advisers, pressed by their clients, to make every point conceivable and inconceivable without judgment or discrimination. In *Banque Financiere de la Cite SA v Westgate Insurance Co Ltd* [1990] 2 All ER 947 at 959; [1991] 2 AC 249 at pp 280–281 I warned against proceedings in which all or some of the litigants indulge in overelaboration causing difficulties to judges at all levels in the achievement of a just result. I also said that the appellant court should be reluctant to entertain complaints about a judge who controls the conduct of proceedings and limits the time and scope of evidence and argument. So too, where a judge, for reasons which are not plainly wrong, makes an interlocutory decision or makes a decision in the course of a trial the decision should be respected by the parties and if not respected should be upheld by an appellate court unless the judge was plainly wrong.
>
> ... the control of the proceedings rests with the judge and not with the plaintiffs. An expectation that the trial would proceed to a conclusion upon the evidence to be adduced is not a legitimate expectation. The only legitimate expectation of any plaintiff is to receive justice. Justice can only be achieved by assisting the judge and accepting his rulings. I have read and agree with the observations of my noble and learned friend Lord Roskill.

In this day and age the lawyer who succeeds is one who is keenly aware of the need for disposal of his cases not only with competency but also with expedition as well.

The above observations of Lord Templeman caught my attention as regrettably — hereafter making a general observation and not necessarily referring to the current case — it is not uncommon for our courts here to encounter the likes of such lawyers, who stand out like the Ayers Rock of Australia. Fortunately, they are few in number. They raise far more points in arguments before the court than is justified, and on each point for argument they cite a welter of case authorities, most of which being derivative cases which require little or no research (derivative authorities are cases cited in the main authority located). Authorities are cited from the weakest to the binding; and issues taken are also deliberately submitted in the order of first the weakest, leading eventually to the forte. While the patient judge keeps writing feverishly, the lawyer gleefully keeps submitting and chalking-up on costs. As a consequence, whereas a court could normally fix 40 chamber matters on a chamber-day-hearing, it may be able to hear only two or three of such cases, and on a separate chamber day, unless such counsel's

cynically designed order of submission is reversed by the court's expressed directions. Surely, economy in points submitted and authorities cited not only saves the court's time but may often work towards saving costs taxable against that lawyer's client should the latter lose the case. The court which takes this approach may even save the client from his own over zealous lawyer.

It is thus necessary for the senior assistant registrars of the High Courts when presiding in taxation matters to be ever alert and vigilant against such practices whereby cases are cited or points raised merely with the view to cost-padding. This approach would be in the interest of consumers of professional legal services. It is important to always bear in mind that the process of litigation is solely to enable a litigant to have his rights litigated, rather than to permit him to acquire monetary gains through high cost awards, which has of recent years been escalating by immeasurable leaps and bounds. Sooner or later the consumer would cry out for such run-away costs to be capped. True, the courts often come across many frivolous claims and sham defences, yet nevertheless there are just as many litigants who happily submit to the courts' adjudication on their arguable claim or defence, and who should not be excessively penalized by the enormity of the costs that they may have to bear should they fail in their cause.

Before I leave the case, it may be of interest to law practitioners to know that this matter has somewhat taken on and assumed a life and momentum on its own. In the wake of my decision on encl 26 and my dismissal of the plaintiffs' application for stay of execution, the plaintiff made two applications to the Court of Appeal for leave to appeal, followed by a final application to the Federal Court.

The first application to the Court of Appeal for leave was couched in the following terms expressed in para 7 of the plaintiffs' affidavit dated 21 October 1994:

> I am advised and verily believe that leave to appeal to the Court of Appeal should be granted to the Intended Appellant/Applicant for the following reasons:
>
> (a) The construction of the Rules (namely O 2 read together with O 28 r 8(1) of the Rules of High Court) by the learned High Court Judge is patently erroneous. Such construction would adversely affect legal practice.
>
> (b) It is a question of general principle decided for the first time as no authority has yet been reported nor was any cited to the court where any court had dismissed the originating process on the ground that proceedings were required to be begun by an originating process other than the one employed.
>
> (c) Further arguments and the decision of the Court of Appeal would be to public advantage.

This application was dismissed on 21 November 1994 with costs.

The second application to the Court of Appeal was affirmed by the plaintiffs' counsel himself which sought on behalf of his client 'a

renewal of the application (the first application to the Court of Appeal for leave) and review of the order (of the Court of Appeal) dated 21 November 1994' on, inter alia, the grounds that:

(a) the court (Court of Appeal in the first application dismissed the application for leave to appeal and for stay of execution pending appeal inter-parties on 21 November 1994 'on paper without a hearing' and had 'decided per incuriam' (in paras 4 and 5), and,

(b) The learned High Court judge (Penang) had gone against the express statutory prohibition in setting aside the whole of the originating summons on the ground that it was the wrong originating process — specifically provided under O 2 r 1(3) of the Rules of the High Court 1980 (RHC) and vide the Supreme Court decision in *Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd* [1992] 2 MLJ 217 despite the fact that ...

This application was also dismissed on 6 February 1995 with costs. However, be it noted, in the second application the applicant had sought to renew his first application on a reviewed and indeed a varied ground. In his earlier application he had stated the matter involved 'a question of general principles decided for the first time as no authority has yet been reported nor was any cited to the court ...'. Whereas, the second application contained some oomph to the punch-line — as it was varied to contend that the High Court judge had not only decided against statutory provision but also against *Ting Ling Kiew* (supra)—a binding authority. Be mindful that I have discussed earlier in this judgment the reasons why *Ting Ling Kiew* (supra) is no authority to apply to the second defendant's application under encl 26. However, if there is a singular factor which I am ad idem here with the plaintiffs' counsel, it is that there is a dearth of authorities on the interpretation of O 2 of the Rules of High Court. Indeed, this is the only motivation that impelled me to embark on writing this judgment despite severe constraints of time.

The matter was not destined to end after the second application for leave. By an affidavit sworn by the plaintiffs dated 27 February 1995, a final application was made to the Federal Court for — what was in effect — leave to appeal against the refusal of the Court of Appeal in the second application to 'renew and review' the decision of the Court of Appeal in the plaintiffs' first application to that court for leave to appeal against the High Court's decision, where 'the learned High court judge has gone against the express prohibition in O 2 r 1(3) RHC 1980 and the Supreme court decision in *Ting Ling Kiew & Anor v Tang Eng Iron Works Co Ltd* [1992] 2 MLJ 217, when he set aside the whole of the originating summons on the grounds of non-compliance with RHC'.

Without unnecessarily commenting on the remarkable nature of the contents of the plaintiffs' second and third applications, but only to report on their cold results, the last application was also finally put to rest and was, on 12 June 1995, dismissed with costs to the respondents.

Irrespective of whether the plaintiffs had succeeded the costs taxable on the whole case by the successful party would have been astronomical considering the number of authorities cited before me and work done on the various subsequent applications at all levels. Such costs would have been outrageously out of all proportion to, what was essentially a RM16,500 claim for the balance purchase price on that fateful car No PBJ 7531 indisputably sold for a paltry RM19,000; and, ironically, in respect of which proceedings could very well have been instituted or reinstituted in the magistrate's court as suggested by counsel for the first and second defendants at the hearing before me.

Order accordingly.

Reported by Rebecca MK Lee